Nga Sheau Sheau v United Merchant Finance Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO 01–22–292 OF 1999
LOW HOP BING J
2 JUNE 2004

Civil Procedure — Appearance — Unconditional appearance — Locus standi — Whether issue of locus standi could be raised after unconditional appearance entered

Contract — Sale and purchase of land — Contingent contract — Death of contracting party — Whether borrower complied with condition precedent in loan agreement — Contingent condition — Whether borrower's death an act of default — Whether borrower's death rendered lender's letter of offer void and incapable of performance — Damages — Whether claim by spouse be allowed — Contracts Act 1950 ss 32, 57(2)

The plaintiff's husband (borrower) entered into a sale and purchase agreement with the Ornaresort Bhd. Subsequently, he entered into a loan agreement with the defendant (lender) whereby he secured a loan of RM60,000. The defendant had approved the loan subject to the special express condition in the loan agreement, ie a mortgage reducing term assurance (mortgage assurance).

The defendant and the borrower executed the loan agreement and duly stamped "12 November 1997" it on it. Unfortunately, the borrower passed away on 17 November 1997 without taking up the mortgage assurance. The plaintiff claimed against the defendant for specific performance of the loan agreement cum assignment for the purchase of the aforesaid property. Alternatively, the plaintiff claimed special damages amounting to RM26,198 being the plaintiff's costs in acquiring the property from the developer.

The issues disputed in this case were as follows: (i) whether the defendant could raise the issue of the plaintiff's locus standi after entering an unconditional appearance; (ii) whether the borrower had complied with the condition precedent contained in the defendant's letter of offer which was subsequently included in the loan agreement which required the borrower to take up the mortgage assurance; (iii) whether the borrower's death was deemed an act of default under cl 10(f) of the loan agreement; (iv) whether the borrower's death had rendered the defendant's letter of offer and loan agreement void so that the defendant was no longer bound thereunder; and (v) whether the plaintiff had suffered any damages and if so, the quantum.

Held, dismissing the plaintiff's claim:

(1) The defendant's desire to raise the preliminary objection must be preceded by the filing of a conditional appearance but the defendant did not do so. Since the defendant had filed an unconditional appearance, it had effectively waived any irregularity of the plaintiff's writ and thus precluded from raising a preliminary objection based on the plaintiff's locus standi (see paras 13–14).

(2) The defendant's letter of offer made it clear, unambiguous and unequivocal that the loan was subject to the condition which became the special express condition in the loan agreement. The plaintiff's contention that

the defendant's had by executing the loan agreement, waived the condition precedent was not accepted. The incorporation of the special express condition into the loan agreement was a reaffirmation of the requirement for the condition precedent to be fulfilled by the borrower which the borrower had not complied with. Thus a loan agreement is not binding on either the borrower or the defendant until the condition precedent is fulfilled (see paras 31, 33 and 41).

(3) Clause 10(f) applied only when the loan had been released by the defendant to the plaintiff pursuant to the loan agreement, which was not the case here as the loan had never been released at all. In fact, the borrower's death had result in an inability to fulfil the special express condition and hence, the answer to question (3) was in the negative (see paras 45–47).

(4) Clause 7 relates to the borrower giving an absolute assignment to the lender, ie the defendant, of all rights, title and interest in the property and the full and entire benefit of the sale and purchase agreement. This clause must be read in the light of special express condition for the purpose of taking up the mortgage assurance. It was impossible for the borrower to take up the mortgage assurance under the special express condition. Such impossibility rendered the loan agreement void under s 57(2) of the Contracts Act 1950 ('CA'). Additionally, the contract in question was a contingent contract pursuant to s 32 of the CA. Therefore since the event was impossible, the contract became void (s 33(b) of the CA) (see paras 51–52, 60–61).

(5) The plaintiff's plea for damages could only be decided after liability was proven. At this stage, the issue on damage was premature and would only be relevant after the defendant's liability under the loan agreement has been determined. Since the loan agreement was void there was no liability attributable to the defendant (see paras 67–69).

[Bahasa Malaysia summary

Suami plaintif (peminjam) telah memasuki satu perjanjian jualbeli dengan Ornarest Bhd. Selepas itu, beliau memasuki perjanjian pinjaman dengan defendan (pemberi pinjaman) di mana beliau mendapati pinjaman sebanyak RM60,000. Defendan telah meluluskan pinjaman yang tertakluk kepada syarat nyata istimewa yang terkandung dalam perjanjian pinjaman iaitu insurans bertempoh gadai janji berkurangan (insurans gadai janji).

Defendan dan peminjam telah menyempurnakan perjanjian pinjaman tersebut pada 12 November 1997. Malangnya, peminjam telah meninggal dunia pada 17 November 1997 tanpa mendapat insurans gadai janji tersebut. Plaintif menuntut perlaksanaan spesifik perjanjian pinjaman dan penyerahhakan untuk jualan hartanah tersebut daripada pihak defendan. Sebagai alternatif, plaintif menuntut ganti rugi istimewa sebanyak RM26,198 iaitu kos plaintif untuk memperolehi hartanah tersebut dari pemaju.

Isu yang dipertikaikan dalam kes ini adalah berikut: (i) sama ada defendan boleh membangkitkan isu locus standi plaintif selepas memasuki kehadiran tanpa syarat; (ii) sama ada peminjam telah mematuhi syarat terdahulu yang terkandung di dalam surat tawaran defendan yang kemudiannya disertakan ke dalam perjanjian pinjaman yang memerlukan peminjam mengambil insurans gadai janji; (iii) sama ada kematian peminjam disifatkan sebagai perbuatan ingkar di bawah kl 10(f) perjanjian pinjaman; (iv) sama ada kematian peminjam menyebabkan surat tawaran defendan dan perjanjian pinjaman tidak sah agar defendan tidak terikat pada pinjaman tersebut; dan (v) sama ada plaintif telah mengalami apa-apa kerugian dan jika ada, jumlahnya.

Diputuskan, menolak tuntutan plaintif:

(1) Hasrat defendan untuk menimbulkan bantahan awal harus didahului dengan memfailkan satu kehadiran bersyarat tetapi defendan tidak membuat demikian. Apabila defendan telah memfailkan kehadiran tanpa syarat, ia telah mengenepikan sebarang luar aturan dalam writ plaintif dan oleh itu dihalang daripada menimbulkan bantahan awal berdasarkan locus standi plaintif (lihat perenggan 13–14).

(2) Surat tawaran defendan telah menerangkan secara jelas dan tidak taksa bahawa pinjaman berkenaan tertakluk kepada syarat yang menjadi syarat nyata yang istimewa dalam perjanjian pinjaman tersebut. Mahkamah tidak manerima hujah plaintif bahawa defendan dengan melaksanakan perjanjian pinjaman telah mengenepikan syarat terdahulu. Pemasukan syarat nyata yang istimewa ke dalam perjanjian pinjaman adalah satu pengesahan semula tentang keperluan untuk syarat terdahulu dipatuhi oleh peminjam yang mana tidak dipenuhi olehnya. Oleh itu satu perjanjian pinjaman tidak mengikat peminjam maupun defendan sehinggalah syarat terdahulu dipatuhi (lihat perenggan 31, 33 dan 41).

(3) Klausa 10(f) hanya digunakan semasa pinjaman dikeluarkan oleh defendan kepada plaintif berdasarkan perjanjian pinjaman, yang bukanlah situasi dalam kes ini kerana pinjaman berkenaan langsung tidak pernah dikeluarkan. Padahal, kematian peminjam telah menyebabkan syarat nyata istimewa tidak dipenuhi dan oleh demikian, jawapan bagi soalan (iii) adalah negatif (lihat perenggan 45–47).

(4) Klausa 7 berkaitan dengan peminjam memberikan penyerahakan mutlak kepada pemberi pinjaman, iaitu defendan kesemua hak, hakmilik dan kepentingan yang terdapat pada hartanah tersebut dan serta kesemua faedah perjanjian jualbeli tersebut. Klausa ini harus dibaca dengan syarat nyata istimewa bagi tujuan memperolehi insurans gadaian janji berkenaan. Adalah mustahil untuk peminjam mendapatkan insurans gadaian di bawah syarat nyata istimewa tersebut. Akibatnya, ini menyebabkan perjanjian pinjaman tidak sah di bawah s 57(2) Akta Kontrak 1950 ('AK'). Tambahan pula, kontrak yang dipersoalkan tersebut adalah sebuah kontrak kontigen menurut s 32 AK. Oleh kerana kejadian tersebut adalah mustahil, kontrak tersebut menjadi tidak sah (s 33(b)) (lihat perenggan 51–52, 60–61).

(5) Tuntutan plaintif ganti rugi hanya boleh selepas liabiliti diputuskan. Pada tahap ini, isu mengenai ganti rugi adalah terlalu awal dan hanya akan jadi relevan selepas liabiliti defendan di bawah perjanjian pinjaman ditentukan oleh mahkamah. Oleh kerana pinjaman adalah tidak sah maka tiada liabiliti berkaitan dengan defendan (lihat perenggan 67–69).

Notes

For cases on unconditional appearances, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1287–1293.

For cases on contingency contract, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4247.

For entry of appearances generally, see 1 *Halsbury's Laws of Malaysia* paras [10.2-094]–[10.2-103].

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47 (refd)

Arul Arulanendhu v Manickam Angamuthu [1992] 2 CLJ (Rep)101(refd)

Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97 (dist)

Dato' Mahmood bin Osman Merican lwn Perbadanan Kemajuan Ekonomi Negeri Johor [1993] 1 MLJ 399 (refd)

Eastacres Development Sdn Bhd v Fatimah Mutallip & Anor [2000] 7 MLJ 371 (refd)

Ho Weng Leong v Ng Kee Chin [1996] 5 MLJ 139 (refd)

Keshore a/l Anupchand Metha & Anor v Abrar Finance Bhd & Anor [2002] MLJU Lexis 1122 (refd)

Lee Cheong Fah v Soo Man Yoke [1996] 2 MLJ 627 (refd)

Lee Seng Hock v Fatimah bte Zain [1996] 3 MLJ 665 (refd)

MBF Property Trust Management Bhd lwn USRA Tampi (M) Sdn Bhd [2000] 1 CLJ 530 (refd)

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211 (refd)

Pembinaan Sepadu Jaya Sdn Bhd v Weng Cheong Holdings Sdn Bhd [1998] 2 CLJ Supp 364 (refd)

Perwira Habib Bank (M)Bhd lwn Loo & Sons Realty Sdn Bhd dan satu lagi (No 1) [1996] 3 MLJ 409 (refd)

Public Finance Bhd v Ehwan bin Saring [1996] 1 MLJ 331(refd)

Rengamah a/p Rengasamy v Tai Yoke Lai & Anor [1998] 5 MLJ 260 (refd)

Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd [1990] 2 MLJ 163(refd)

Sathiaval a/l Maruthamuthu v Shell Malaysia Trading Sdn Bhd [1998] 1 MLJ 740 (refd)

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (dist)

Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd [1991] 2 MLJ 251 (refd)

Avro International', 'The; 'The Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor [1988] 1 MLJ 147 (refd)

Welch v Royal Exchange Assurance [1938] 4 All ER 289 (refd)

Legislation referred to

Contracts Act 1950 ss 32, 33(b), 57(2)

Khairil Aznan Azizi (Andrew TS Goh & Khairil) for the plaintiffs.
Visalakshi Suparamaiam (Syarikat Rodziah) for the defendants.

Low Hop Bing J:

PLAINTIFF'S CLAIM

[1] By this writ of summons, the plaintiff claims against the defendant for:

(i) the specific performance of a loan agreement cum assignment dated 11November 1997 ('the loan agreement') in respect of the property held under B39 PT 3497 Orna Golf & Country Club, in the mukim of Air Panas, district of Jasin, state of Melaka ('the property'); or alternatively

(ii) special damages amounting to RM26,198 being the plaintiff's costs in acquiring the property from the developer;

(iii) interest at 4%pa from the date of filing this writ to the date of judgment; and thereafter, at 8%pa to the date of realisation; and

(iv) costs.

AGREED FACTS

[2] The parties herein have agreed to the following facts.

[3] The defendant is at all material times a company having a registered address on the 11th Floor, MUI Plaza, Jalan P Ramlee, 50200 Kuala Lumpur and a branch at No 80–82, Jalan Bendahara, 75100 Melaka.

[4] The plaintiff sues as the widow of Chong Sau Nan, the deceased who during his lifetime as a purchaser executed a sale and purchase agreement on 24 December 1996 with the developer Ornaresort Bhd as the vendor ('the SPA').

[5] On 11 November 1997, the deceased as borrower and the defendant as lender entered into the loan agreement whereby the borrower agreed to take a loan of RM60,000 ('the loan') from the defendant and the defendant has approved the loan, subject to the special express condition in the loan agreement which reads as follows:

> A Mortgage Reducing Term Assurance shall be taken up by the Borrower for a sum insured equivalent to the value of the Loan and for a period equivalent to the duration of the Loan. The beneficiary of the policy shall be the Lender.

[6] This special express condition was also contained in the defendant's letter of offer dated 4 June 1997 ('the letter of offer').

[7] The loan agreement was executed by both the borrower and the defendant on 11 November 1997, and duly stamped on 12 November 1997.

[8] For brevity, the mortgage reducing term assurance shall be referred to hereinafter as 'the mortgage assurance', and a reference to a clause hereinafter is a reference to that clause in the loan agreement, unless the context otherwise requires.

[9] The borrower unfortunately passed away on 17 November 1997, without taking up the mortgage assurance.

AGREED ISSUES FOR DETERMINATION

[10] The parties have agreed that the questions for determination herein are:

(i) whether the defendant having entered an unconditional appearance is precluded from raising the issue of the plaintiff's locus standi in this writ?

(ii) whether the borrower has complied with the condition precedent contained in the defendant's letter of offer which was subsequently included in the loan agreement which requires the borrower to take up the mortgage assurance?

(iii) whether the borrower's death is deemed an act of default under cl 10(f) of the loan agreement?

(iv) whether the borrower's death has rendered the defendant's letter of offer and loan agreement void so that the defendant is no longer bound thereunder?

(v) whether the plaintiff has suffered any damage and, if so, the quantum?

SUBMISSION FOR PARTIES AND DECISION OF THE COURT

(i) Plaintiff's locus standi

[11] For the defendant, learned counsel En Khairil Aznan bin Azizi, raised a preliminary objection on the ground that the plaintiff has no locus standi as there was no privity of contract between the plaintiff and the defendant.

[12] Cik Visalakshi a/p Suparamaiam, learned counsel for the plaintiff argued that the defendant having entered absolute appearance is not at liberty to raise the plaintiff's locus standi.

[13] In my judgment, it must be stated here that the defendant's desire to raise the preliminary objection pertaining to the plaintiff's locus standi must be preceded by the filing of a conditional appearance but the defendant has not done so. The challenge based on the plaintiff's locus standi is in effect grounded on the irregularity of the writ filed by the plaintiff.

[14] It is trite law that once the defendant has filed an unconditional appearance, as is the case here, the defendant has effectively waived any irregularity of the plaintiff's writ and so is precluded from raising a preliminary objection based on the plaintiff's locus standi (see *Avro International', 'The; 'The Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147 at p 149 (CA Singapore) per Lai Kew Chai J.

[15] The answer to question (i) is in the affirmative.

(ii) Mortgage assurance

[16] The plaintiff submits that the mortgage assurance is not a condition precedent as it did not provide for the time to take up and so this condition is void for uncertainty, as the court must look into the intention of the parties and not to the title of the contract, relying on *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141; and *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97.

[17] She added that under cl 35, the defendant has the discretion to take up and maintain a life assurance policy to guarantee the payment of all moneys secured under the loan agreement and all costs and expenses incurred shall become payable by the plaintiff to the defendant. Further, it was stressed that the defendant has never required the plaintiff to take up and produce the mortgage assurance.

[18] It was also argued for the plaintiff that the plaintiff has given a power of attorney to the defendant under cl 31 and that with effect from the execution of the loan agreement on 11 November 1997, the responsibility to take up life assurance has shifted to the defendant.

[19] Alternatively, it was contended for the plaintiff that the execution of the loan agreement before the taking up of the mortgage assurance shows that the defendant has waived this requirement.

[20] The defendant contended that para 14(v) of the defendant's letter of offer and later included as special express condition in the loan agreement provide that the mortgage assurance is a condition precedent, relying on *Welch v Royal Exchange Assurance* [1938] 4 All ER 289, and that it is the plaintiff's responsibility to take up the mortgage assurance with which the plaintiff has not complied, as a result of which the loan cannot be released. *Chitty on Contracts* (24 Ed) Vol 1 para 693 was cited.

[21] He said that cl 35 does not place an obligation on the defendant to take up a mortgage assurance for the plaintiff as that clause uses the word 'may' and does not refer to any mortgage assurance at all.

[22] As regards the power of attorney given by the plaintiff to the defendant, the defendant submitted that cl 31 does not concern any mortgage assurance.

[23] The defendant argued that the issue of the defendant's waiver does not arise.

[24] I shall first consider the authorities cited for the plaintiff.

[25] *Sia Siew Hong*, concerns the proper construction by the Court of Appeal of a document described as a guarantee when it was an indemnity, and does not revolve around the issue of the non-fulfilment by a borrower to take up a mortgage assurance.

[26] In Chuah Eng Khong, the facts have no relevance whatsoever to the facts in the case before me. Further, the issues for determination by the Federal Court there have no semblance whatsoever with the agreed questions for determination in the instant case.

[27] In short, none of the above two cases can be said to support the plaintiff's case.

[28] In my judgment, an illustration of a condition precedent may be discerned from *Welch v Royal Exchange Assurance*. In that case, the claimant was insured with the defendants against fire, and the policy contained a condition by which the insured was to give to the insurers all such proofs and information with respect to any claim as might reasonably be required. The English Court of Appeal held that upon the proper construction of the condition, the insured was bound to give the required particulars within a reasonable time of being asked to do so. If he did not do so, and, indeed had not done so, he was barred from recovering under the policy, as this condition was a condition precedent.

[29] Within our shores, in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47, the Privy Council advised that cl 4 of the sale and purchase agreement there which required the vendor to obtain a renewal of the leases was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend.

[30] *Chitty on Contract* (24th Ed) Vol 1 Chapter 12 para 691 contains an instructive exposition on 'conditions precedent' to the following effect:

> 1 Where the liability of one or both of the contracting parties may become effective only if certain facts are ascertained to exist or upon the happening of some further event, the contract is said to be subject to a condition precedent.
>
> 2 The failure of a condition precedent may have one of a number of effects, eg:
>
> 2.1 It may suspend the rights and obligations of both parties, as, for instance, where the parties enter into an agreement on the express understanding that it is not to become binding on either of them unless the condition is fulfilled;
>
> 2.2 One party may assume an immediate unilateral binding obligation, subject to a condition. From this he cannot withdraw; but no bilateral contract, binding on both parties, comes into existence until the condition is fulfilled; or
>
> 2.3 The parties may enter into an immediate binding contract, but subject to a condition, which suspends all or some of the obligations of one or both parties pending fulfilment of the condition.
>
> 3 A condition precedent is, however, contingent and not promissory, and neither party will be liable to the other if the condition is not fulfilled.

[31] On the agreed facts in the instant case, I am of the view that the defendant's letter of offer made it clear, unambiguous and unequivocal in para 14(v) that the loan is subject to the condition which now becomes the special express condition in the loan agreement.

[32] Taking a purposive approach and upon a reasonable reading of para 14(v) of the defendant's letter of offer and the special express condition, I entertain

no doubt that these two provisions concern a condition precedent which must be fulfilled by the borrower in order to avail himself of the loan. It is an essential requirement, ie a *sine qua non* that the borrower 'shall' take up the mortgage assurance for a sum insured equivalent to the value of the loan and for a period equivalent to the duration of the loan and the lender, ie the defendant shall be the beneficiary of the policy.

[33] Applying the exposition of 'conditions precedent' by *Chitty on Contract*, it is clear to me that the non-fulfilment of this condition precedent leaves a vacuum in the substratum of the loan. The loan agreement was therefore not binding on either the borrower or the defendant until the condition precedent is fulfilled. This condition precedent is contingent and not promissory and neither the borrower nor the defendant would be liable to the other if the condition precedent was not fulfilled.

[34] Where, as in this case, no time limit has been set in the special express condition for the plaintiff to take up the mortgage assurance, it means that the borrower has to take up the mortgage assurance within a reasonable time. What is reasonable time depends on all the circumstances of the case and an objective test is to be applied.

[35] The defendant's letter of offer containing the condition was issued on 4 June 1997 and the loan agreement was executed on 11 November 1997, while the borrower's untimely demise was on 17 November 1997. There was a lapse of a considerable period of some five months during the borrower's lifetime when the borrower was able and indeed in a position to take up the mortgage assurance.

[36] It is indeed a pity that the borrower has not fulfilled this condition precedent during his lifetime and, alas, due to the supervening event of his untimely demise, was never ever able to take up the mortgage assurance.

[37] Clause 35, on which the plaintiff relies, merits reproduction as follows:

CLAUSE 35 LIFE ASSURANCE POLICY

The Lender may from time to time and at any time hereafter require the Borrower to take up and maintain a life assurance policy or any other policy guaranteeing the repayment of all the moneys hereby secured or any part thereof whether absolutely or on the happening of a contingency and to assign the said policy and benefits and advantages thereunder to the Lender as further security for all moneys hereby secured and any default by the Borrower in the taking up and maintaining of such policy and assigning the same as and when required, the Lender may at its discretion take up and maintain such policy guaranteeing the repayment of all moneys hereby secured or any part thereof on such terms as the Lender may think fit and all costs and expenses incurred by the Lender in taking out and maintaining the said policy shall become payable by the Borrower to the Lender with interest thereon at the Prescribed Rate with monthly rests and until payment shall be charged on the said Property.

[38] Upon a proper perusal of cl 35, it cannot be doubted that it confers upon the defendant a discretion to take up a life assurance policy generally as the word used is 'may'. On the other hand, cl 14(v) of the defendant's letter

of offer and the special express condition are special provisions which impose an obligation on the plaintiff when the word 'shall' was used in relation to the mortgage assurance. Such special provisions would prevail over the general provisions under cl 35 — *Generalia specialibus non derogant*.

[39] Further, the plaintiff seeks the support of cl 31 concerning the appointment of the defendant as Attorney which reads:

> For the consideration aforesaid the Borrower hereby irrevocably appoints the General Manager/the Assistant General Manager/Manager of the Lender or any person appointed by the Lender as Attorney for the Borrower and in the Borrower's name and on the Borrower's behalf to deal with the said Property in any manner whatsoever and to enforce all rights and remedies under the Agreement at any time the Lender may deem fit to do so even where no event of default as specified in Clause 10 hereof shall have occurred including the right to accept and to execute as Attorney for the Borrower the instrument of transfer of the said Property by the Vendor to the Borrower and to execute as Attorney for the Borrower the Memorandum or Memoranda of Charge in favour of the Lender to secure the Loan herein upon issuance of the strata/separate document of title to the said Property and do all other things as fully and effectually as the Borrower could do himself in connection therewith and in particular but without prejudice to the generality of the foregoing to assign sell let lease or demise the said Property or any part thereof and to do all whatsoever acts and execute all whatsoever documents to give effect to such assignment sale letting or lease which the Lender may deem necessary on any sale by the Lender of the Borrower's right title and interest in the said Property under the power of sale conferred by this Agreement and to give a good receipt for the purchase moneys received and also to do and perform all whatsoever acts matter things necessary or expedient for the registration of this instrument as fully and effectually as the Borrower could do himself if he were personally present with power for such Attorney to substitute and appoint one or more attorneys under him for all or any of the purposes aforesaid as he shall think fit AND the Borrower hereby agrees and undertakes at all times hereafter to ratify and confirm whatsoever the said Attorney or his attorney or attorneys shall lawfully do or cause to be in and concerning the said Property by virtue of this instrument.

[40] In my view, under cl 31, the power of attorney was given by the borrower to the defendant to deal with the property and to enforce all rights and remedies under the loan agreement at any time the defendant may deem fit, including the right to accept and to execute as attorney for the plaintiff the instrument of transfer of the property, the memorandum of charge in favour of the defendant to secure the loan, and other matters connected therewith. Clause 31 makes no reference whatsoever to any mortgage assurance, and so cannot be construed as shifting to the defendant the responsibility to take up a mortgage assurance for the borrower.

[41] I am unable to accept the plaintiff's contention that the defendant has, by executing the loan agreement, waived the condition precedent which requires the borrower to take up the mortgage assurance. On the contrary, the incorporation of the special express condition into the loan agreement is a reaffirmation of the requirement for the condition precedent to be fulfilled by the borrower, which the borrower has not complied with.

[42] The answer to question (ii) is therefore in the negative.

(iii) Default

[43] In relation to question (iii), it was submitted for the plaintiff that the plaintiff's claim is based on the defendant's failure to release the loan as agreed by the defendant and that the death of the borrower is not a default within cl 10, since cl 10 has no application here.

[44] In response, it was submitted for the defendant that the borrower's death comes within cl 10(f).

[45] In my judgment, cl 10 provides for the list of events, eg the borrower's death under cl 10(f) which would constitute an act of default giving rise to the consequence of all sums of money owing under the loan agreement becoming immediately payable by the borrower to the defendant. Clause 10(f) only applies when the loan has been released by the defendant to the plaintiff pursuant to the loan agreement, which is not the case here as the loan has never been released at all.

[46] In fact, the borrower's death has resulted in the inability of the borrower to fulfil the special express condition, ie the taking up of the mortgage assurance which has been considered in question (ii) above.

[47] On the facts of this case, the answer to question (iii) is in the negative.

(iv) Assignment by borrower

[48] The plaintiff subscribes to the view that the borrower's death does not render the loan agreement void as the borrower, ie the deceased has pursuant to cl 7 absolutely assigned the property to the defendant and so the loan agreement is still binding on the defendant.

[49] The defendant contended that the loan agreement was rendered void due to the impossibility of taking up the mortgage assurance and so was no longer binding on the defendant.

[50] Clause 7 reads as follows:

> CLAUSE 7 ASSIGNMENT
>
> For the consideration aforesaid the Borrower hereby ABSOLUTELY ASSIGNS unto the Lender all the Borrower's rights title and interest in and to the said Property and the full and entire benefit of the Sale Agreement but without any of the liabilities thereunder PROVIDED ALWAYS that notwithstanding the assignment hereinbefore contained or any other provisions of this Agreement the Borrower shall and hereby undertakes to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the Borrower expressed and contained in the Sale Agreement.

[51] In my judgment, cl 7 relates to the borrower giving an absolute assignment to the lender, ie the defendant of all rights title and interest in the property and the full and entire benefit of the SPA. Clause 7 must be read in the light of the special express condition for the purpose of taking up the mortgage assurance.

[52] There is no dispute that the death of the borrower has resulted in the non-fulfilment by and indeed the impossibility of the borrower taking up the mortgage assurance under the special express condition. Such impossibility in my view renders the loan agreement void under s 57(2) of the Contracts Act 1950 which, where relevant, provides:

> A contract to do an act which, after the contract is made, becomes impossible becomes void.

[53] Section 57(2) is a statutory formulation of the common law doctrine of frustration when the contract to do an act, eg to give a loan in the instant case becomes impossible as a result of the non-fulfilment of the condition precedent.

[54] Apart from unlawfulness, s 57(2) envisages another instance resulting in the frustration of a contract, ie where a contract to do an act becomes impossible (see eg *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd* [1991] 2 MLJ 251 per Lim Beng Choon J (as he then was); *Eastacres Development Sdn Bhd v Fatimah Mutallip & Anor* [2000] 7 MLJ 371 per Abdul Malik Ishak J; *Keshore a/l Anupchand Metha & Anor v Abrar Finance Bhd & Anor* [2002] MLJU Lexis 1122 per Abdul Malik Ishak J.

[55] There are many enlightening judgments which serve as illustrations to s 57(2).

[56] In *Lee Seng Hock v Fatimah bte Zain* [1996] 3 MLJ 665, the Court of Appeal held, inter alia, that when the subject matter of a sale and purchase agreement has been compulsorily acquired and compensation awarded, it gave rise to the frustration of the agreement so as to discharge the parties thereto of their obligations thereunder and the agreement was void as the performance of the agreement has become impossible under s 57(2).

[57] Where the special condition of a tenancy agreement expressly stated that the tenant (plaintiff) was to use the demised premises to carry on the business of karaoke, musical lounge and KTV, and there was an implied term that the landlord (defendant) should obtain the approval for conversion of the demised premises from housing to business, but the defendant has failed to obtain the approval, as in *Ho Weng Leong v Ng Kee Chin* [1996] 5 MLJ 139, it was held by Abdul Malik Ishak J that there was a frustration of the tenancy agreement as the agreement has become impossible to perform.

[58] In *Public Finance Bhd v Ehwan bin Saring* [1996] 1 MLJ 331, the vehicle under a hire purchase agreement was seized by the customs soon after the agreement was executed and had not been returned to either party since. Mohd Ghazali J (now JCA) held that it had become impossible for the appellant to pass a good title to the respondent and so the agreement had become void under s 57(2).

[59] An employee's inability to continue with his employment with the employer as a result of the two-year detention of the employee by the police under the Emergency (Public Order and Prevention of Crimes) Ordinance 1969 was held to have frustrated the employment contract: per Kang Hwee Gee J

in *Sathiaval a/l Maruthamuthu v Shell Malaysia Trading Sdn Bhd* [1998] 1 MLJ 740.

[60] Additionally, the contract in question is a contingent contract which is defined in s 32 of the Contracts Act 1950 as a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.

[61] Under s 33, contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until the event has happened, and if the event becomes impossible, the contract becomes void: s 33(b).

[62] Section 33(b) was considered by the Federal Court in *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 where Salleh Abas CJ (Malaya) (later LP) held that where the sale and purchase of property was subject to the approval of the Foreign Investment Committee and no such approval was given, the contract did not take effect and the agreement became void in accordance with s 33(b).

[63] In *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163, cl 2 of the second agreement stipulated that if and when the then Land Code (Cap 138) were amended to permit the club to grant to the company a lease of 99 years, the club would do so. The question for determination by Lim Beng Choon J (as he then was) was whether the contingent event in cl 2 of the second agreement had been ineffective and impossible to perform as a result of the repeal of the Land Code by the National Land Code which does not provide for the grant of a 99 year lease. The learned judge held, inter alia, that since the contingent event has become impossible to perform, the second agreement has become void under s 33(b).

[64] A similar conclusion was reached by the learned judge pursuant to s33(b) in *Arul Arulanendhu v Manickam Angamuthu* [1992] 2 CLJ (Rep) 101 where the consent of the state authority was required to transfer a piece of land but such consent was not forthcoming.

[65] In *Dato' Mahmood bin Osman Merican lwn Perbadanan Kemajuan Ekonomi Negeri Johor* [1993] 1 MLJ 399, cl 7 of the agreement requires the approval of the Capital Issue Committee to effect the sale and purchase of shares, but no such approval was obtained, as a result of which Abdul Aziz J (now JCA) held that the contingent contract was void under s 33(b).

(See also *Lee Cheong Fah v Soo Man Yoh @ Saw Man Yoke* [1996] 2 BLJ 356 per Abdul Malik Ishak J; *Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Sdn Bhd dan satu lagi (No 1)* [1996] 3 MLJ 409 per Ahmad Fairuz JCA (now CJ; *Rengamah a/p Rengasamy v Tai Yoke Lai & Anor* [1998] 5 MLJ 260 per Augustine Paul JC (now JCA); *Pembinaan Sepadu Jaya Sdn Bhd v Weng Cheong Holdings Sdn Bhd* [1998] 2 CLJ Supp 364 per Kamalanathan Ratnam JC (now J); and *MBF Property Trust Management Bhd lwn USRA Tampi (M) Sdn Bhd* [2000] 1 CLJ 530 per Faiza Tamby Chik J.)

[66] Hence, the answer to question (iv) is in the affirmative.

(v) *Damages to plaintiff*

[67] In relation to this issue, it was submitted for the plaintiff that the plaintiff is entitled to damages as pleaded.

[68] For the defendant, it was argued that this issue is to be decided only after the court has arrived at a finding on liability.

[69] The short answer to question (v) is that at this stage, this issue is premature and will only be relevant after the defendant's liability under the loan agreement has been determined by the court. As the loan agreement is void, no liability is attributable to the defendant.

CONCLUSION

[70] On the foregoing grounds, I am of the view that the plaintiff is not entitled to the equitable decree of specific performance or a claim for common law damages. The plaintiff's claim is hereby dismissed.

COSTS

[71] Since the defendant's preliminary objection has been overruled and the plaintiff's claim fails, I am of the view that the position of the parties *vis-à-vis* the question of costs has been placed in equilibrium, in which case, I order the parties herein to bear their own costs.

Plaintiff's claim dismissed.

Reported by Jeyanthi Mala